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VIA ELECTRONIC FILING

November 17, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street N.W.
Room CY-B402
Washington, D.C. 20554

Re: Notice of Ex Parte
CC Docket Nos. 96-262, 01-92

Dear Ms. Dortch:

In this letter, Broadwing Communications, LLC ("Broadwing") is responding to the ex parte letter submitted to the Commission on behalf of US LEC Corporation ("US LEC") in support of its Petition for Declaratory Ruling[1] in CC Docket No. 01-92 on August 25, 2003. *See* Letter from R. Rindler, Counsel for US LEC, to M. Dortch, FCC (August 25, 2003) ("US LEC Letter").

In its letter, US LEC attempts to defend the access charges that it assesses Broadwing and other interexchange carriers for interexchange calls that are originated or terminated by CMRS providers, in which calls US LEC unnecessarily inserts itself between the CMRS provider and the ILEC access tandem. US LEC then charges Broadwing the full benchmark interstate access rate and splits the receipts with the applicable CMRS provider. This action violates the FCC's April 2001 CLEC Benchmark Order (CC Docket No. 96-262, and the July 2002 Sprint PCS Declaratory Order (WT Docket No. 01-316), and is not supported by any current FCC rule. Moreover, US LEC's claim (that permitting it to charge the full benchmark rate to recover revenues for access functions it does not perform on behalf of carriers not authorized to recover such revenues will "promote competition") is simply ludicrous.[2]

In a typical CMRS-originated interexchange call, a call is initially routed from the wireless customer to the MTSO switch, which MTSO switch provides end office switching functions. The call is then routed from the MTSO switch to the ILEC access tandem, which then routes the call to the IXC. In this scenario, which is typically tariffed by ILECs as Type IIA service, the ILEC would bill the CMRS provider for switched

[1] Petition for Declaratory Ruling of US LEC Corp. CC Docket No. 01-92, filed September 18, 2002.
[2] US LEC Letter, at pp. 11-13.

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transport between the MTSO office and the tandem. The ILEC would then bill the IXC for the access functions (*i.e.*, tandem switching, transport) for transporting the call between the tandem and the IXC. The process works the same for interexchange calls terminated to a CMRS provider.

US LEC however, has apparently made arrangements with wireless providers to insert itself into the Type IIA call process. When, for example, a long-distance wireless call is originated in the ordinary course of business, the call is routed to the MTSO switch. However, instead of US LEC's routing the call directly from there to the ILEC tandem, US LEC routes the call to its local switch and then to the ILEC tandem. US LEC pays the ILEC for transporting the call to the tandem (or sometimes, to a meet point) and then charges Broadwing the full CLEC benchmark. US LEC apparently then delivers to the CMRS provider a portion of this revenue. Thus, because US LEC unnecessary inserts itself into the Type IIA call process, Broadwing is charged double for many switched access functions, as Broadwing pays (1) the ILEC for tandem switching and transport between the tandem and the switch and (2) US LEC for the local loop, end office switching, and transport (*i.e.*, the functions for which CLECs are permitted to charge in the access benchmark). At most, US LEC provides only the transport between its switch and the ILEC tandem; this transport cost exists only because of US LEC's actions to insert itself into the call process.

As noted above, US LEC's actions violate at least two Commission Orders. First, US LEC is illegally charging the entire CLEC benchmark rate, when US LEC is providing *only* transport and nothing more. In the CLEC Benchmark Order, the Commission clarified which access functions can be part of the benchmark, by stating the following:

> We seek to preserve the flexibility, which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CCLC switched access service does not require any particular rate element or rate structure; for example, it does not dictate whether a CLEC must use flat-rated charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather it is based on a per-minute cap for all interstate-switched access service charges. In this regard, there are certain basic services that make up interstate-switched access service offered by most carriers. Switched access service typically entails: 1) a connection between the caller and the local switch, 2) a connection between the LEC switch and the serving wire center (often referred to as "interstate transport'), 3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most CLECs seek compensation for the same basic elements, however precisely named: 1) common line charges; 2) local switching; 3) transport. The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark.

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The only access function that US LEC is "performing" in these instances is the interstate transport between the US LEC switch and the ILEC tandem. That function is unnecessary and is simply the result of unnecessary transit function provided by (and instituted by) US LEC. Therefore, at best, US LEC is entitled to charge Broadwing only for transport fees; US LEC is *not* entitled to charge Broadwing for the local loop and end office switching functions, which functions are performed by the CMRS provider.

In addition, the arrangements that US LEC has made with CMRS providers (to split these illegal access charges) are clearly illegal under the FCC's Sprint PCS Declaratory Order. As the Commission clearly stated, CMRS providers are not permitted to charge for interstate-switched access unless they have existing contracts with an IXC. In that Order, the Commission discussed the merits of Sprint PCS' unilaterally imposing access charges on AT&T, but the conclusions are applicable to all CMRS providers. The Commission stated as follows:

> That Sprint PCS may seek to collect access charges from AT&T does not, however, resolve the question whether Sprint PCS may unilaterally impose such charges on AT&T. There are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract…CMRS access services are subject to mandatory detariffing, and it is therefore undisputed that Sprint PCS could not have imposed access charges on AT&T pursuant to any tariff. Consequently we need only consider whether Sprint PCS can impose access charges on AT&T pursuant to commission rules or a contract between the parties.
>
> We find that there is no Commission rule that enables Sprint PCS unilaterally to impose access charges on AT&T…There being no authority under the Commission's rules or a tariff for Sprint PCS unilaterally to impose access charges on AT&T, Sprint PCS is entitled to collect access charges in this case only to the extent that a contract imposes a payment obligation on AT&T.

Broadwing has no existing contracts with any CMRS providers by which Broadwing is obligated to pay access fees for originating or terminating interexchange calls that transit the US LEC network. Therefore, US LEC's payment of a portion of its access revenues to CMRS providers for these calls is clearly in violation of the Commission's Declaratory Order.

Finally, US LEC itself understands that its practice of unnecessarily inserting itself in a CMRS-originated or terminated interexchange call, and then charging and splitting the benchmark access rate with the CMRS provider, is not supported by the Commission's rules. This was the basis for the filing by US LEC of a Petition For Declaratory Ruling with the FCC on September 18, 2002 (in CC Docket No. 01-92), requesting the FCC to issue a rule affirming that LECs are entitled to recover access charges from IXCs on

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interexchange calls that originate or terminate on the networks of CMRS providers. As US LEC is aware, the Commission has taken no action on this Petition.

US LEC attempts (wrongfully) to claim in its letter (pages 3-5), that the Sprint PCS Declaratory Ruling applies only narrowly to CMRS-originated traffic and not to wireline LEC's receiving access revenues from the CMRS provider and then splitting such revenues with the CMRS provider. The main intent of CC Docket 01-92 was to ensure that carriers (such as US LEC) do not take advantage of opportunities to abuse the system and obtain a competitive advantage. It would not make sense for the Commission, on the one hand, to forbid CMRS providers to recover access charges (unless they had a contract), and on the other, to allow access recovery by a CMRS provider as long as a LEC collected the charges first. However, this irrational defense is the only defense presented by US LEC to defend its practices.

It also seems self-serving for US LEC to contend that Section 69.5 of the Commission's Rules permits US LEC to tariff interstate access charges. It is clear that section 69 applies only to incumbent LECs and not to CLECs, and US LEC is certainly sufficiently sophisticated to recognize this. If US LEC takes the position that the access rules for incumbent LECs apply to US LEC, then all other rules for incumbent LECs should apply to US LEC. A carrier should not be allowed to pick-and-chose the rules under which the carrier wishes to be regulated.

Finally, US LEC's assertion that allowing it to charge the full benchmark access rate for CMRS-originated or terminated traffic will promote competition is irrational. In fact, the practical effect of this practice has been to siphon funds from Broadwing, which funds could be used to build facilities and/or develop markets, to US LEC. Although US LEC characterizes its practice as victimless, clearly Broadwing (and Broadwing's customers) have been the victims of this practice. In fact, if the Commission truly wants to promote competition, it should conclude that US LEC's access scheme is unlawful and should require US LEC to make retroactive payment for all of its illegally obtained access revenues.[3]

Respectfully submitted,

/s/ Kathryn L. Turpin /s/

Kathryn L. Turpin
Corporate Counsel

[3] Broadwing agrees with the retroactivity arguments made in the ex parte letter submitted to the Commission from R. Aamoth and J. Kashatus, Kelly, Drye & Warren to M Dortch, FCC, filed on behalf of ITC DeltaCom Communications on September, 11, 2003, in CC Docket Nos. 96-262 and 01-92, at pp. 7-8.